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Constitutional Law-Substantive Due Process-Abortion-Reasonable Statutory Recordkeeping and Reporting Requirements Upheld-Planned Parenthood v. Danforth

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Constitutional Law—SUBSTANTIVE DUE PROCESS—ABORTION—REASONABLE STATUTORY RECORDKEEPING AND REPORTING REQUIREMENTS UPHELD—*Planned Parenthood v. Danforth*, 96 S. Ct. 2831 (1976).

Planned Parenthood, a not-for-profit corporation, and two Missouri physicians brought suit in 1974 requesting injunctive relief from the operation of a new Missouri abortion statute and challenging its constitutionality.[1] The action challenged provisions, applicable to the first twelve weeks of pregnancy, requiring a patient's written consent for an abortion, spousal consent for an abortion, and parental consent prior to performing an abortion on unmarried minors. The action also challenged provisions defining viability, requiring the physician to exercise professional care to preserve the fetus' life and health, declaring an infant who survives an abortion that was not performed to save the mother's life or health to be a ward of the state, prohibiting the saline amniocentesis method of abortion after the first twelve weeks of pregnancy, and prescribing reporting and recordkeeping requirements for health facilities and for physicians performing abortions.

A three-judge federal district court held all the challenged provisions valid except the requirement that physicians exercise professional care to preserve the life and health of the fetus.[2] On appeal, the United States Supreme Court ruled that the provisions requiring spousal and blanket parental consent, prohibiting the saline amniocentesis method of abortion, and requiring physicians to exercise professional care to preserve the fetus were unconstitutional. The provisions defining viability, requiring the patient's consent, and prescribing reporting and recordkeeping requirements, however, were upheld.[3] The scope of this case note will be confined to issues raised by the reporting and recordkeeping requirements of the Missouri statute.

I. BACKGROUND

The Supreme Court and many of its academic critics agree

1. 96 S. Ct. at 2835. The statute, MO. ANN. STAT. §§ 188.010-.085 (Vernon Supp. 1976), was drafted to replace Missouri's previous abortion legislation, which was declared unconstitutional in 1973 as a result of the Supreme Court's decisions in Roe v. Wade, 410 U.S. 113 (1973), and Doe v. Bolton, 410 U.S. 179 (1973). 96 S. Ct. at 2835. The suit, naming John C. Danforth, Attorney General of Missouri, and the Circuit Attorney of St. Louis as defendants, was filed three days after the new law became effective. *Id.*

2. Planned Parenthood v. Danforth, 392 F. Supp. 1362 (E.D. Mo. 1975).

3. 96 S. Ct. at 2838-48. The Court declined (on grounds of standing) to decide the constitutionality of the provision declaring an infant who survives an abortion not performed to save the mother's life or health a ward of the state. *Id.* at 2838 n.2.

that judicial review of abortion legislation is bottomed on substantive due process theory.[4] This oft denounced theory has undergone a long and turbulent development, including a period of virtual extinction. The standards applied under its rubric have experienced a similar history.[5]

A. Standards Applied in Substantive Due Process Analysis

1. The old substantive due process

The old substantive due process culminated in *Lochner v. New York*,[6] the infamous symbol of economic due process, which propounded a reasonableness standard for determining the validity of state legislation:

> [T]he question necessarily arises: Is this a fair, reasonable and appropriate exercise of the police power of the State, or is it an unreasonable, unnecessary and arbitrary interference with the right of the individual to his personal liberty or to enter into . . . contracts . . . ?[7]

In short, *Lochner* demanded that both the end and the means of legislation must affirmatively be shown to be reasonable.[8]

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4. Roe v. Wade, 410 U.S. 113 (1973), held that the
> right of privacy, whether it be founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action, *as we feel it is*, or, as the District Court determined, in the Ninth Amendment's reservation of rights to the people, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy.

Id. at 153 (emphasis added), *quoted in* instant case, 96 S. Ct. at 2837. Academic support for this view can be found in Dixon, *The "New" Substantive Due Process and the Democratic Ethic: A Prolegomenon*, 1976 B.Y.U. L. REV. 43, 83-85; Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920 (1973) (denunciation of *Roe*); Epstein, *Substantive Due Process by Any Other Name: The Abortion Cases*, 1973 SUP. CT. REV. 159 (criticism of *Roe*); Perry, *Abortion, the Public Morals, and the Police Power: The Ethical Function of Substantive Due Process*, 23 U.C.L.A. L. REV. 689 (1976) (defense of *Roe* and *Doe v. Bolton*).

5. *See* G. GUNTHER, CASES AND MATERIALS ON CONSTITUTIONAL LAW 548-656 (9th ed. 1975); Dixon, *supra* note 4, at 43; Strong, *The Economic Philosophy of Lochner: Emergence, Embrasure and Emasculation*, 15 ARIZ. L. REV. 419 (1973).

6. 198 U.S. 45 (1905). For a detailed history and analysis of the *Lochner* philosophy, see Strong, *supra* note 5, at 419.

7. 198 U.S. at 56.

8. The Court also stated:
> The act must have a more direct relation, as a means to an end, and the end itself must be appropriate and legitimate, before an act can be held to be valid which interferes with the general right of an individual to be free in his person and in his power to contract . . . .

Id. at 57-58.

Although *Lochner* and most similarly decided subsequent cases of its era involved the application of substantive due process theory to invalidate legislation regulating the economic sphere,[9] the Court also made significant use of the theory in reviewing noneconomic legislation.[10] In this field, too, the Court employed a reasonableness standard to adjudicate the constitutionality of legislation: "[R]ights guaranteed by the Constitution may not be abridged by legislation which has no reasonable relation to some purpose within the competency of the State."[11]

The effectual demise of economic due process occurred in the 1930's,[12] and the reasonableness standard, although remaining essentially unchanged in its verbal configuration, deteriorated into a "minimum rationality" test that involved no meaningful scrutiny of legislation affecting economic rights.[13] Minimum rationality, also known as the rational relation or rational basis test, began with the premise that "the law need not be in every respect logically consistent with its aims to be constitutional."[14] This test, therefore, required merely that "there [be] an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it."[15] In keeping with this spirit of judicial *laissez faire,* the Court, after *Nebbia v. New York*[16] and *West Coast Hotel Co. v. Parrish,*[17] invariably

9. *See, e.g.,* New State Ice Co. v. Liebmann, 285 U.S. 262 (1932); Adkins v. Children's Hosp., 261 U.S. 525 (1923); Coppage v. Kansas, 236 U.S. 1 (1915); Adair v. United States, 208 U.S. 161 (1908). During the period from 1905 to the mid-1930's, nearly 200 economic regulations were ruled unconstitutional, but a larger number withstood constitutional attack. G. GUNTHER, *supra* note 5, at 564-65.

10. In Meyer v. Nebraska, 262 U.S. 390 (1923), the Court held unconstitutional a Nebraska statute that prohibited the teaching of foreign languages below the eighth grade. The decision was based on the Fourteenth Amendment's concept of liberty, including "the right of the individual . . . to acquire useful knowledge, to marry, establish a home and bring up children, to worship God . . . , and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men." *Id.* at 399. Similarly, Pierce v. Society of Sisters, 268 U.S. 510 (1925), invalidated an Oregon law that required all children to attend public schools.

11. Pierce v. Society of Sisters, 268 U.S. 510, 535 (1925). Similar language is used in Meyer v. Nebraska, 262 U.S. 390, 400, 403 (1923). Both of these decisions have escaped much of the artillery aimed at the *Lochner* approach.

12. *See* West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937); Nebbia v. New York, 291 U.S. 502 (1934).

13. *See* Williamson v. Lee Optical, Inc., 348 U.S. 483 (1955); Day-Brite Lighting, Inc. v. Missouri, 342 U.S. 421 (1952); G. GUNTHER, *supra* note 5, at 591-92; McCloskey, *Economic Due Process and the Supreme Court: An Exhumation and Reburial,* 1962 SUP. CT. REV. 34.

14. Williamson v. Lee Optical, Inc., 348 U.S. 483, 487-88 (1955).

15. *Id.* at 488.

16. 291 U.S. 502 (1934).

17. 300 U.S. 379 (1937).

succeeded in finding that economic regulation had at least a minimally rational relation to some legitimate state purpose.[18]

2. The new substantive due process

In the realm of "personal" rights, substantive due process faded with the passing of the *Lochner* era[19] and was seldom invoked[20] until its spectacular regeneration in *Griswold v. Connecticut.*[21] *Griswold* held that a law forbidding the use of contraceptives unconstitutionally intruded upon the "right of privacy" of an individual.[22] Although Justice Douglas explicitly declined to adopt *Lochner* as a guide and based the decision on penumbras and emanations from the Bill of Rights,[23] in light of language from *Roe v. Wade*[24] to the effect that the right of privacy is founded on the "Fourteenth Amendment's concept of personal liberty and restrictions upon state action,"[25] *Griswold* must realistically be viewed as resting most comfortably on a substantive due process foundation.[26] The Court in *Griswold* applied the "familiar principle . . . that a 'governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms.'"[27]

The strictness of the *Griswold* standard became fully apparent when the Court announced its decision in *Roe v. Wade* eight

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18. G. GUNTHER, *supra* note 5, at 591; McCloskey, *supra* note 13, at 34.

19. G. GUNTHER, *supra* note 5, at 619.

20. The substantive due process methodology can be detected in Skinner v. Oklahoma *ex rel.* Williamson, 316 U.S. 535 (1942) (law requiring sterilization of larceners and certain other habitual criminals held unconstitutional, although technically on equal protection grounds) and in Aptheker v. Secretary of State, 378 U.S. 500 (1964) (holding that denial of passports to members of Communist organizations violates due process).

21. 381 U.S. 479 (1965).

22. *Id.* at 485.

23. *Id.* at 482-85.

24. 410 U.S. 113 (1973).

25. *Id.* at 153.

26. Dixon, *supra* note 4, at 83-84; Henkin, *Privacy and Autonomy*, 74 COLUM. L. REV. 1410, 1427 (1974).

27. 381 U.S. at 485 (quoting NAACP v. Alabama *ex rel.* Flowers, 377 U.S. 288, 307 (1964)). Justice Goldberg, in a concurring opinion joined by Chief Justice Burger and Justice Brennan, emphasized the extent of protection afforded "fundamental liberties" with notions and language borrowed from equal protection cases:

> "Where there is a significant encroachment upon personal liberty, the State may prevail only upon showing a subordinating interest which is compelling," Bates v. Little Rock, 361 U.S. 516, 524. The law must be shown "necessary, and not merely rationally related, to the accomplishment of a permissible state policy." McLaughlin v. Florida, 379 U.S. 184, 196.

381 U.S. at 497.

years later. *Roe* held that the "right of personal privacy includes the abortion decision,"[28] that only "fundamental" rights are included in the right of personal privacy,[29] that regulation limiting fundamental rights "may be justified only by a 'compelling state interest,' . . . and that legislative enactments must be narrowly drawn to express only the legitimate state interests at stake."[30] Borrowing the compelling state interest test from equal protection cases, where its invocation has uniformly resulted in the invalidation of legislation,[31] results in scrutiny of abortion legislation on a much stricter level than the old substantive due process standards of reasonableness and minimum rationality would have required.[32] *Roe* and its companion case, *Doe v. Bolton,*[33] resulted in the substantial invalidation of the criminal abortion laws of nearly every state.[34]

B. *Constitutional Attacks on Reporting and Recordkeeping Provisions of the New Abortion Statutes*

In the wake of *Roe* and *Doe,* state legislatures drafted new laws governing abortions. Widespread attacks on these new abortion statutes included constitutional challenges of reporting and recordkeeping requirements prescribed by some of them. The court decisions in these cases are almost evenly divided—some upholding the provisions, others striking them down.

1. *Authority upholding reporting and recordkeeping provisions*

Probably the most determined assault on a reporting provi-

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28. *Id.* at 154.

29. *Id.* at 152.

30. *Id.* at 155.

31. Gunther, *The Supreme Court 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection,* 86 HARV. L. REV. 1, 8-9 (1972); Lee, *Mr. Herbert Spencer and the Bachelor Stockbroker: Kramer v. Union Free School District No. 15,* 15 ARIZ. L. REV. 457, 465 (1973). As Chief Justice Burger has pointed out:

> Some lines must be drawn. To challenge such lines by the "compelling state interest" standard is to condemn them all. So far as I am aware, no state law has ever satisfied this seemingly insurmountable standard, and I doubt one ever will, for it demands nothing less than perfection.

Dunn v. Blumstein, 405 U.S. 330, 363-64 (1972) (dissenting opinion).

32. G. GUNTHER, *supra* note 5, at 637-38; Ely, *supra* note 4, at 935.

33. 410 U.S. 179 (1973).

34. *See* Roe v. Wade, 410 U.S. 113, 139-40 (1973); Doe v. Bolton, 410 U.S. 179, 181-82 (1973). For a classification and discussion of abortion laws as of 1972, see Comment, *A Survey of the Present Statutory and Case Law on Abortion: The Contradictions and the Problems,* 1972 U. ILL. L.F. 177.

sion to date was that brought in *Schulman v. New York City Health and Hospitals Corp.*,[35] in which New York's highest court held that a regulation requiring reporting of names and addresses of abortion patients[36] was "rationally related and narrowly tailored to the compelling State interest in maternal health."[37] Obediently applying the compelling state interest test prescribed by *Roe v. Wade*,[38] the court struggled to rationalize its conclusion in the face of vigorous dissents by three of the seven justices.[39] In attempting to demonstrate that the name reporting requirement was rationally related and narrowly tailored to the compelling state interest in maternal health, the majority devoted much of its opinion to a discussion of the general benefits of abortion reporting, most of which, as the dissenters pointed out, could probably be accomplished equally well without reporting of names. The court relied heavily on the absence of direct proof that the name requirement dissuaded women from procuring abortions,[40] while the dissent insisted that the "chilling effect" of name reporting on the right to an abortion was patently evident.[41] The majority's only attempt to reconcile first trimester abortion reporting with *Roe*'s ban of first trimester regulation was an observation that reporting enables health officials "to determine whether second trimester abortions are being falsely reported as first trimester abortions."[42] The dissenting justices protested that such reasoning "obliterates completely the careful distinctions between the two trimesters drawn by the Supreme Court."[43] Applying the "less restrictive alternative" requirement[44] of the

35. 38 N.Y.2d 234, 342 N.E.2d 501, 379 N.Y.S.2d 702 (1975), *aff'g* 44 App. Div. 2d 482, 355 N.Y.S.2d 781 (1974).

36. The New York City Board of Health prescribed the form and content of the pregnancy termination certificate pursuant to N.Y. CITY HEALTH CODE §§ 204.03, .05.

37. 38 N.Y.2d at 245, 342 N.E.2d at 507, 379 N.Y.S.2d at 710. The court emphasized the importance of N.Y. CITY HEALTH CODE § 204.07 protecting the confidentiality of such records. 38 N.Y.2d at 237, 240, 244, 342 N.E.2d at 502, 504, 507, 379 N.Y.S.2d at 703, 706, 710. For further discussion of confidentiality requirements, see notes 116-127 and accompanying text *infra*.

38. Notes 28-32 and accompanying text *supra*.

39. 38 N.Y.2d at 245-57, 342 N.E.2d at 507-15, 379 N.Y.S.2d at 710-21. The majority's difficulty in rationalizing its holding is largely attributable to the use of the compelling state interest test with its strong "presumption" of unconstitutionality. If the court had been free to apply a standard of reasonableness with a neutral weighing of interests, it could have reached the same result with relative ease. *See* notes 99-106 and accompanying text *infra*.

40. 38 N.Y.2d at 240, 342 N.E.2d at 504, 379 N.Y.S.2d at 706.

41. *Id.* at 253-54, 342 N.E.2d at 513-14, 379 N.Y.S.2d at 718-19.

42. *Id.* at 239, 342 N.E.2d at 503, N.Y.S.2d at 705.

43. *Id.* at 253, 342 N.E.2d at 513, N.Y.S.2d at 718.

44. This requirement is discussed at notes 74-80 and accompanying text *infra*.

compelling state interest test, the dissent concocted a scheme for compiling abortion data according to coded numbers instead of patients' names, yet the plan included a means of identifying patients by name.[45] The net result of such a plan is needless complication with no real increase in protection of privacy. Other courts that have upheld similar reporting provisions have apparently been able to do so with much less difficulty than that experienced by the New York court.[46]

2. Authority holding reporting and recordkeeping laws unconstitutional

A decision representative of those that have invalidated reporting and recordkeeping requirements is *Hodgson v. Anderson,*[47] which held that extensive abortion regulations (including recording and reporting rules) issued by the Minnesota State Board of Health[48] were unconstitutional.[49] The major reasons for the court's conclusion were the statute's failure to ex-

45. 38 N.Y.2d at 247, 342 N.E.2d at 509, N.Y.S.2d at 712.

46. *See* Planned Parenthood v. Danforth, 96 S. Ct. 2831, 2846-47, *aff'g* 392 F. Supp. 1362 (E.D. Mo. 1975); Doe v. Bolton, 410 U.S. 179, 184, 201, 204 (1973); Planned Parenthood v. Danforth, 392 F. Supp. 1362, 1374 (E.D. Mo. 1975), *aff'd,* 96 S. Ct. 2831 (1976); Planned Parenthood Ass'n v. Fitzpatrick, 401 F. Supp. 554 (E.D. Pa. 1975) (upholding the portion of a provision that required reporting of an abortion patient's name, address, age, and date of abortion while striking down portions that required reporting of the spouse's name and address, names of parents of unmarried minor abortion patients, and facts showing the necessity of abortion); Wolfe v. Schroering, 388 F. Supp. 631 (W.D. Ky. 1974), *rev'd on other grounds,* 541 F.2d 523 (6th Cir. 1976) (upholding a statute requiring reporting of abortions performed after the first trimester, but ruling that reporting of the patient's street address was impermissible). In none of these cases was there a dissent from the holding that reporting requirements passed constitutional muster.

47. 378 F. Supp. 1008 (D. Minn. 1974), *appeal dismissed for want of juris. sub nom.* Spannaus v. Hodgson, 420 U.S. 903 (1975), *rev'd in part per curiam sub nom.* Hodgson v. Lawson, No. 74-1569 (8th Cir., Oct. 6, 1976) (recordkeeping requirements directed to preservation of maternal health that respect patients' privacy are permissible regardless of stage of pregnancy). Other decisions that have invalidated reporting laws include Friendship Medical Center, Ltd. v. Chicago Bd. of Health, 505 F.2d 1141 (7th Cir. 1974), *cert. denied,* 420 U.S. 997 (1975) (entire body of regulations struck down for failure to exclude first trimester of pregnancy from regulation); Word v. Poelker, 495 F.2d 1349 (8th Cir. 1974) (entire act invalidated for failure to exclude first trimester from regulation and lack of legitimate relationship to state interests); Doe v. Zimmerman, 405 F. Supp. 534 (M.D. Pa. 1975) (striking down entirely the reporting provisions upheld in Planned Parenthood Ass'n v. Fitzpatrick, 401 F. Supp. 554 (E.D. Pa. 1975); Doe v. Rampton, 366 F. Supp. 189 (D. Utah 1973) (entire abortion statute held unconstitutional although two of the three judges regarded the reporting provisions as constitutional).

48. The text of the regulations appears in 378 F. Supp. at 1020-28. The regulations were issued by the Minnesota State Board of Health pursuant to MINN. STAT. ANN. § 145.413(1) (West Supp. 1976).

49. 378 F. Supp. at 1018.

clude first trimester abortions from regulation, the unnecessary extra layer of complex regulation not reasonably related to maternal health, and the singling out of abortion for special regulation that tended to chill the abortion decision.[50] It is important to note, however, that although *Hodgson* invalidated the *regulations* issued pursuant to the Minnesota statute,[51] the *statute* itself, which authorized the board of health to promulgate appropriate regulations to effect a system for reporting abortions, was left largely intact.[52]

II. INSTANT CASE[53]

In the instant case, appellants argued that Missouri's reporting and recordkeeping provisions were unconstitutional because they imposed an extra layer and burden of regulation on abortions and because they applied throughout all stages of pregnancy. The Court responded to the first objection by conceding that there may be "conflicting interests affected by recordkeeping requirements," but it concluded that "[r]ecordkeeping and reporting requirements that are reasonably directed to the preservation of maternal health and that properly respect a patient's confidentiality and privacy are permissible."[54] In addition, although the Court stated that it could "see no legally significant impact or consequence on the abortion decision or on the physician-patient relationship,"[55] it warned against abusive or excessive use of recordkeeping "in such a way as to accomplish, through the sheer burden of recordkeeping detail, what we have held to be an otherwise unconstitutional restriction."[56]

The second objection to the recordkeeping provisions, that they applied throughout all stages of pregnancy, was dismissed with little explanation. Appellants argued that the state, in the first trimester of pregnancy, cannot impose any recordkeeping requirements that differ significantly from those imposed on comparable medical procedures. The Court's cursory response to this argument was that the recordkeeping provisions, "while perhaps

50. *Id.*

51. MINN. STAT. ANN. § 145.413(1) (West Supp. 1976).

52. 378 F. Supp. at 1012, 1016, 1018.

53. Since this case note is confined to the topic of abortion reporting requirements, this section will discuss only the small portion of the Court's opinion that dealt with such requirements. The bulk of the opinion was devoted to more controversial issues such as spousal and parental consent.

54. 96 S. Ct. at 2846.

55. *Id.*

56. *Id.* at 2846-47.

approaching permissible limits, are not constitutionally offensive in themselves."[57] In support of this conclusion, the Court observed that recordkeeping could be useful in protecting health and "may be a resource that is relevant to decisions involving medical experience and judgment."[58] It further pointed out that recordkeeping had no apparent significant impact on the abortion decision and that Missouri physicians were also required to participate in reporting births, deaths, communicable diseases, and use of controlled substances.[59]

III. Analysis

The selection of a standard to apply in constitutional adjudication is a crucial choice—one that often decides the ultimate issues before the standard is brought to bear upon the facts of a particular case.[60] In order to evaluate the soundness of the decision in the instant case, it is first necessary to analyze the alternative standards in an attempt to arrive at a conclusion as to which standard is most appropriate in this and similar cases involving substantive due process.

A. Compelling State Interest Test

The Supreme Court has declared that the right of privacy is a "fundamental right,"[61] that the right of privacy includes the right to an abortion,[62] and that a regulation limiting fundamental rights can be justified only by a compelling state interest.[63] Thus, in the instant case, the Court could have opted to apply the strict compelling state interest test. The use of this strict approach, however, shifts the initial focus of judicial scrutiny away from the reasonableness of legislation and places it on the individual right involved, to determine whether it is a fundamental right, *i.e.*, a right deserving of special protection.[64] This determination is inherently arbitrary and subjective since the Court has failed to prescribe any useful criteria for deciding which rights are funda-

57. *Id.* at 2846.
58. *Id.*
59. *Id.* at 2846 & n.13.
60. *See* note 31 and accompanying text *supra.*
61. Griswold v. Connecticut, 381 U.S. 479, 485 (1965); Roe v. Wade, 410 U.S. 113, 152 (1973).
62. Roe v. Wade, 410 U.S. 113, 153 (1973).
63. *Id.* at 155.
64. Lee, *supra* note 31, at 465.

mental.[65] Moreover, some fundamental rights are apparently more fundamental than others.[66] The technique of classifying some rights as fundamental is further confused by the fact that a given right may be characterized in different ways or regarded as being derived from different sources. A right that is fundamental under one characterization may not be fundamental under a different characterization. For instance, the plaintiffs in *Schulman* challenged abortion reporting requirements under three theories: (1) that the reporting of names of abortion patients infringes the right to an abortion, (2) that it violates the right to privacy connected with the use of one's name, and (3) that it violates the physician-patient privilege.[67] These theories may be regarded as different characterizations of the same body of rights. While the first characterization is regarded as a fundamental right, the others are not likely to be so regarded by the courts.

Once the right in question is classified as fundamental, the state can justify its infringement only by showing a compelling state interest. Thus, another semantic imponderable arises: Is the interest that the state has asserted to justify the challenged regulation a compelling interest or merely a legitimate one? *Roe v. Wade* announced that maternal health is a compelling interest, but only after the first trimester of pregnancy.[68] It also announced that a state's interest in preserving fetal life is not compelling until the fetus becomes "viable" at approximately 24-28 weeks of

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65. Goodpaster, *The Constitution and Fundamental Rights*, 15 ARIZ. L. REV. 479, 505-06 (1973). Goodpaster concludes that only four classes of rights are fundamental: first amendment rights, political participation rights, and rights to due process and equal protection. He excludes, however, the right of privacy and the right to travel, both pronounced fundamental by the Supreme Court. *Id.* at 428-83.

66. Although first amendment rights are regarded as fundamental, *Roe* gave the "right to abortion" more rigorous protection than the First Amendment receives. *See* Bigelow v. Virginia, 421 U.S. 809, 826 (1975) ("[a]dvertising, like all public expression, may be subject to reasonable regulation that serves a legitimate public interest"); Wolff v. McDonnell, 418 U.S. 539 (1974) (holding that a prison regulation requiring that mail from attorneys to inmates be opened by prison officials in the presence of the inmates did not violate the constitutional rights of prisoners); Grayned v. City of Rockford, 408 U.S. 104, 115 (1972) (discussing the right to use a public place for expressive activity, the Court said, "[o]ur cases make equally clear, however, that reasonable 'time, place and manner' regulations may be necessary to further significant governmental interests, and are permitted"); Ely, *supra* note 4, at 935.

67. 38 N.Y.2d at 237 & n.1, 342 N.E.2d at 502 & n.1, 379 N.Y.S.2d at 703 & n.1.

68. 410 U.S. at 163. This conclusion was explicitly based on medical data tending to show that mortality in abortion during the fiist trimester "may be less than mortality in normal childbirth." *Id.* The possibility thus remains that the state could regulate first trimester abortions under certain circumstances if they were shown to be more dangerous than normal childbirth.

pregnancy.[69] The Court in *Roe* sought to balance the public interests of maternal health and fetal life against the private interests of autonomy and privacy, but the Court kept a heavy thumb on the private side of the scales by invoking the compelling state interest test with its virtual presumption of unconstitutionality.[70]

If the state's interest in limiting a fundamental right is deemed compelling, then the state must show an appropriate relationship between the questioned regulation and the compelling interest. Some commentators and courts have insisted that to satisfy the required relationship the regulations limiting the right to abortion must be *necessary* to the achievement of a compelling state interest,[71] but this formulation of the test may be overly strict. *Roe v. Wade* required only that, after the first stage of pregnancy, regulations limiting the right to abortion must be *reasonably related* (rather than necessary) to a compelling state interest, such as maternal health.[72] The apparent difference between these two formulations of the test may not be as great as it first appears, however, since *Roe* added that "legislative enactments must be narrowly drawn to express only the legitimate state interests at stake."[73]

The additional qualification that abortion legislation must be narrowly tailored to legitimate interests is generally included in the verbal baggage of the compelling state interest test[74] in one or more of its variations, including "overbreadth,"[75] "less (or least) drastic means,"[76] "less restrictive alternative,"[77] "precision

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69. 410 U.S. at 160, 163.

70. Notes 28-32 and accompanying text *supra.*

71. *E.g.,* Schulman v. New York City Health & Hosps. Corp., 38 N.Y.2d 234, 250, 342 N.E.2d 501, 511, 379 N.Y.S.2d 702, 715 (1975) (dissenting opinion); Comment, *In Defense of Liberty: A Look at the Abortion Decisions,* 61 GEO. L.J. 1559, 1569 (1973); Note, Roe *and* Paris*: Does Privacy Have a Principle?,* 26 STAN. L. REV. 1161, 1166-67, 1172-73 (1974). As used in these sources, "necessary" is synonymous with "indispensable."

72. 410 U.S. at 164. *Doe v. Bolton* also required the relationship to be reasonable rather than necessary. 410 U.S. 179, 194-95 (1973).

73. 410 U.S. at 155. Establishing that the two formulations are in fact identical appears to be as hopeless as answering a philosopher's riddle.

74. *See, e.g.,* Lubin v. Panish, 415 U.S. 709, 716-18 (1974); Dunn v. Blumstein, 405 U.S. 330, 342-43 (1972); NAACP v. Button, 371 U.S. 415, 438 (1963); Shelton v. Tucker, 364 U.S. 479, 488 (1960).

75. *E.g.,* Doe v. Bolton, 410 U.S. 179, 194 (1973); United States v. Robel, 389 U.S. 258, 262, 265-66 (1967); Aptheker v. Secretary of State, 378 U.S. 500, 508, 514 (1964).

76. *E.g.,* United States v. Robel, 389 U.S. 258, 268 (1967); Shelton v. Tucker, 364 U.S. 479, 488 (1960). For a discussion of this concept, see Note, *Less Drastic Means and the First Amendment,* 78 YALE L.J. 464 (1969) (concluding that the doctrine is not a useful tool).

77. *See, e.g.,* Lubin v. Panish, 415 U.S. 709, 716-18 (1974). For exhaustive discussion of this principle, see Struve, *The Less-Restrictive-Alternative Principle and Economic*

of regulation,"[78] and "necessity."[79] Although these variations are intended to articulate a requirement of precision of regulation, the requirement is far from precise in both theory and practice. Its primary usefulness is in emphasizing the strictness with which the Court scrutinizes a particular law.[80]

As one constitutional law scholar observed in commenting on the compelling state interest language of *Roe v. Wade,*

> All of this terminology may be no more than an elaborate way of saying that the validity of a statute burdening the interest in privacy is determined by weighing the extent of the burden against the importance of the state interests. If so, the language changes nothing. It may, however, suggest a more mechanical approach: if the interest in privacy is burdened, whether substantially or not, the regulation must be necessary to achieve a compelling state interest. Such an interpretation would tend to extend to the interest in privacy a measure of protection greater than that normally accorded other constitutionally protected interests.[81]

Despite the Supreme Court's concern for the weighing and balancing of competing interests,[82] the Court's use of such absolutist language as "fundamental right," "compelling state interest," and "narrowly drawn" has led many lower courts into the error of mechanically granting the right to abortion and the right of "privacy" an inordinate and undeserved protection that exceeds the protection granted to such long-standing rights as those guaranteed by the First Amendment.[83] Even the Supreme Court has

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Due Process, 80 HARV. L. REV. 1463 (1967); Note, *The Less Restrictive Alternative in Constitutional Adjudication: An Analysis, A Justification, and Some Criteria,* 27 VAND. L. REV. 971 (1974).

78. *E.g.,* NAACP v. Button, 371 U.S. 415, 438 (1963).

79. *E.g.,* Dunn v. Blumstein, 405 U.S. 330, 342 (1972); Shapiro v. Thompson, 394 U.S. 618, 634 (1969).

80. *See* Dunn v. Blumstein, 405 U.S. 330, 342-43 (1972) (using the terms "necessary," "precision," "tailored," and "less drastic means" as makeweights to justify extremely strict scrutiny in that case).

81. Barrett, *Judicial Supervision of Legislative Classifications—A More Modest Role for Equal Protection?,* 1976 B.Y.U. L. REV. 89, 121.

82. Notes 99-108 and accompanying text *infra.* This concern for balancing can also be detected in Roe v. Wade, 410 U.S. 113 (1973), and in Doe v. Bolton, 410 U.S. 179 (1973).

83. Note 66 *supra.* In Word v. Poelker, 495 F.2d 1349 (8th Cir. 1974), a St. Louis ordinance regulating abortion clinics was struck down in its entirety because the court was not persuaded that it was "necessary to protect either the state's interest in maternal health or future life" and because it failed to exclude the first trimester of pregnancy from regulation. *Id.* at 1351. In Friendship Medical Center, Ltd. v. Chicago Bd. of Health, 505 F.2d 1141 (7th Cir. 1974), *cert. denied,* 420 U.S. 997 (1975), Chicago health regulations governing abortions were declared invalid for the same reasons. The court conceded that

often been guilty of using the compelling state interest standard in a rigid, mechanical way in equal protection cases.[84] In view of its tendency to obfuscate important issues and to mechanically overprotect abortion and other rights, the compelling state interest test and most of its verbal baggage[85] should be discarded, at least in the abortion context.[86]

B. Minimum Rationality

The toothless minimum rationality test applied in *Nebbia v. New York*[87] and subsequent economic due process cases purports to require that legislation be rationally related to a legitimate state interest.[88] Although this test contains the same language used frequently to strike down legislation during the *Lochner* period, it has come to represent a virtual abdication of judicial scrutiny by indiscriminately upholding legislation of dubious validity.[89] It is highly unlikely that the Court, in the near future, will apply the minimum rationality test to abortion legislation since that test represents the polar opposite of the compelling state

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the regulations might be upheld under the traditional "rational relationship" standard, but it mechanically invoked the fatal compelling state interest test. *Id.* at 1150. Another instance of the mechanical approach is Doe v. Zimmerman, 405 F. Supp. 534 (M.D. Pa. 1975), in which all the challenged provisions of Pennsylvania's abortion statute were declared unconstitutional. Lower courts have overprotected abortion in the sense that they have frequently invalidated laws similar to those sustained in the instant case. *See, e.g.*, notes 47-50 and accompanying text *supra*.

84. Note 31 and accompanying text *supra*.

85. Notes 61-80 and accompanying text *supra*.

86. In commenting on *Roe v. Wade*, one scholar observed:

> Even in cases that do not give rise to the devilish questions of what counts as a person, the term "compelling state interest" is an analytical snare of no modest proportions. But here . . . the phrase is but a plaything of the judges, an excuse but never a reason for a decision.

Epstein, *supra* note 4, at 184-85. *See* Goodpaster, *supra* note 65, at 483, 513-14 (advocating a reasonableness-balancing standard for most rights, including privacy); Perry, *supra* note 4, at 733 n.203 (concluding that the compelling state interest test had no place in resolution of the fundamental issue in *Roe v. Wade* of whether abortion regulation intruded on a matter outside the scope of public morals).

Although it is hazardous to prognosticate, it appears that the Court's approach in *Danforth*, notes 99-108 *infra*, coupled with the marked absence of compelling interest language in that opinion and the Court's recent showing of distaste for strict scrutiny in equal protection and First Amendment cases, suggests that the Court is scuttling the compelling state interest test. *See* Bigelow v. Virginia, 421 U.S. 809 (1975) (declining to apply the overbreadth test and applying a reasonableness test in a first amendment case), *noted in* 61 CORNELL L. REV. 640 (1976); G. GUNTHER, *supra* note 5, at 839-88; Gunther, *supra* note 31, at 17-21, 37-38.

87. 291 U.S. 502 (1934).

88. *See* notes 13-15 and accompanying text *supra*.

89. *See* notes 9-18 and accompanying text *supra*.

interest test of *Roe v. Wade.*[90] Minimum rationality, however, merits discussion because of the possibility, however remote, that some courts may read the instant case as applying a minimum rationality standard.

In the instant case, the Court obviously employed a much stricter degree of scrutiny than that which the minimum rationality test entails, since the Court held most of the challenged Missouri provisions unconstitutional.[91] Under the minimum rationality approach, the Court could have upheld all the provisions challenged by demonstrating that "there [was] an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it."[92]

Minimum rationality would not be a desirable standard for review of abortion legislation because it suffers from the same kinds of defects that plague the compelling interest standard.[93] It has degenerated into a mechanical approach that announces, rather than explains, the result; it makes a proper balancing of interests impossible by overloading one side of the scales;[94] and it ignores important factors such as the degree of infringement of private rights and the importance (or unimportance) of the state's interest in regulation. Because of these defects, minimum rationality and the compelling state interest test should, and possibly will, be abandoned. Although these tests may be valid as extreme endpoints of a general standard of reasonableness,[95] they are superfluous because the general standard encompasses them. Their tendency to become crystallized as general standards in many contexts and the misleading effect of the compelling state interest test on lower courts support the view that they should be discarded. The recent development of the "newer" equal protec-

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90. In the context of equal protection, however, the Supreme Court has recently breathed new life and meaning into the rationality test. In its rejuvenated form, it is a neutral standard involving genuine scrutiny that commonly includes a balancing of interests. Gunther, *supra* note 31, at 17-21. This modern standard, as applied in the context of substantive due process, will be discussed in text accompanying notes 99-129 *infra.*

91. Notes 2-3 and accompanying text *supra.*

92. Williamson v. Lee Optical, Inc., 348 U.S. 483, 488 (1955).

93. Notes 65-66, 81-86 and accompanying text *supra.*

94. Notes 13-18 and accompanying text *supra.*

95. One constitutional law scholar reasoned:

> [B]oth the "rational" basis standard and the strict scrutiny standard of due process and equal protection review are wrong as general standards. They describe instead specific instances of application of a general standard, reasonableness review. They are the respective end points of the continua of due process and equal protection review.

Goodpaster, *supra* note 65, at 513-14.

tion's rationality standard lends credence to the suggestion that the Court may abandon both the minimum rationality and the compelling state interest tests in other contexts as well.[96]

C. *Reasonableness Standard with Balancing of Interests*

The appropriate standard for reviewing abortion legislation (and other legislation within the purview of substantive due process) is necessarily a vague one since attempts to formulate more precise standards seem largely counterproductive.[97] A standard of reasonableness, although vague, has served long and faithfully in American jurisprudence in numerous contexts. The reasonableness standard in constitutional adjudication requires that legislative ends and means be fair and reasonable as seen in the light of a neutral weighing and balancing of the interests of the state against the interests of persons whose rights are jeopardized by the legislation in question.[98]

In the instant case, the Supreme Court appears to have applied such a reasonableness standard in arriving at its determination that Missouri's statutory provisions for the reporting of abortions were constitutionally valid.[99] In reaching its conclusion that "[r]ecordkeeping and reporting requirements that are reasonably directed to the preservation of maternal health and that properly respect a patient's confidentiality and privacy are permissible,"[100] the Court sought to weigh the interests of the abortion patient against the interests of the state. Relevant interests of the patient include the qualified right to an abortion without undue regulation,[101] the right of privacy regarding information about oneself,[102] and the freedom from interference in the

96. The newer equal protection's rationality standard bears a superficial resemblance to minimum rationality in that it uses the same "rational relation" language, but the Court has recently used the rationality standard in numerous cases to invalidate legislation that would have easily survived minimum rationality scrutiny. In those cases, the Court carefully avoided the use of compelling state interest language and genuinely scrutinized the challenged legislation to ensure that it was indeed rationally related to a legitimate governmental interest. Note 90 *supra*.

97. Notes 61-86 and accompanying text *supra*.

98. *See* Goodpaster, *supra* note 65, at 512-15.

99. The Court did not explicitly announce the standard it chose to apply, but its language is much more suggestive of a neutral reasonableness standard with balancing of interests than of a compelling state interest approach that requires the state to select the least restrictive alternative.

100. 96 S. Ct. at 2846.

101. *Id.* at 2837.

102. Although the Court never explicitly mentioned this "right" in the *Danforth* opinion, the Court's emphasis on respect for a patient's "confidentiality and privacy," *id.* at 2846, reveals that this right was being protected.

physician-patient relationship.[103] Relevant state interests include preserving maternal health and life and monitoring abortions to ensure that they are performed in conformity with the law.[104]

After considering these competing interests, the Court concluded that the balance struck by the Missouri law was acceptable and reasonable. As to private interests, the Court said that as long as useful recordkeeping is not abused or overdone and privacy and confidentiality are protected, abortion recordkeeping has "no legally significant impact or consequence on the abortion decision or on the physician-patient relationship,"[105] and privacy of information is likewise uninfringed. As to state interests, the Court chose not to speak in terms of absolutes, but deferred to the legislature's judgment that the law was reasonable by observing that "maintenance of records indeed may be helpful in developing information pertinent to the preservation of maternal health."[106]

Further evidence of the reasonableness-balancing standard can be found in portions of the opinion that dealt with other provisions of Missouri's abortion statute. First, with respect to the issue of spousal consent, the Court weighed paternal rights against the mother's rights and concluded that "[s]ince it is the woman who physically bears the child and who is the more directly and immediately affected by the pregnancy, as between the two, the balance weighs in her favor."[107] Second, in resolving the parental consent issue, the Court weighed the interests of the state, the minor, and her parents and decided that "[a]ny inde-

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103. *Id.* at 2846.

104. *Id.* The Court noted that the latter interest (which is largely dependent upon the existence of other interests, especially the interests in maternal health and fetal life) "fades somewhat into insignificance in view of our holding above as to spousal and parental consent requirements." *Id.* In other words, the state could no longer require execution of spousal and parental consent forms. The state's interest in monitoring abortions, however, retains significance in view of provisions requiring the patient's written consent, Mo. ANN. STAT. § 188.020(2) (Vernon Supp. 1976), requiring the physician's certification that the fetus was not viable, *id.* § 188.030, and requiring the patient's certification that she has been informed that her parental rights may be in jeopardy if the fetus survives, *id.* §§ 188.040, .045. The Court's implicit recognition of the state's interest in monitoring abortions may be significant in that it tends to discredit the common assumption that the state can regulate abortions in the second trimester *only* in ways reasonably related to maternal health. *Roe v. Wade* did not say that maternal health was the *only* state interest worthy of recognition. *See* 410 U.S. at 162-64.

105. 96 S. Ct. at 2846.

106. *Id.* In the next paragraph the Court added that "[r]ecordkeeping of this kind . . . *can* be useful to the State's interest in protecting the health of its female citizens, and *may* be a resource that is relevant to decisions involving medical experience and judgment." *Id.* (emphasis added).

107. 96 S. Ct. at 2842.

pendent interest the parent may have in the termination of the minor daughter's pregnancy is no more weighty than the right of privacy of the competent minor mature enough to have become pregnant."[108]

While many may disagree with the relative weight the Court assigned to the competing interests, it is significant that a balancing approach was utilized rather than a narrow, mechanical application of compelling state interest jargon. It is also significant that the Court's holding as to the spousal and parental consent provisions applies only to the first twelve weeks of pregnancy[109] and that the Court left room for a parental veto, given sufficient justification, even in the first twelve weeks of pregnancy.[110] The significance of these facets of the instant case lies in the fact that the Court has not foreclosed the possibility that a different balance may be struck in subsequent stages of pregnancy, under different statutory schemes, or when medical knowledge has added greater insight into abortion issues.

By using a reasonableness-balancing approach, the Court was able to reach a sound conclusion as to the validity of the reporting provision of Missouri's abortion statute. Unhampered by the compelling state interest test and its distorting influence,[111] the Court recognized that the reporting law struck a reasonable balance between the state's interest in maternal health and the patient's interest in privacy and autonomy. Although the Court did not expound on the relationship between reporting abortion information and preserving the health of pregnant women, the possible dangers and deleterious consequences of abortions, including cervical scarring, subsequent miscarriages and premature births, sterility, menstrual complications and neurosis,[112] amply justified the Missouri legislature in prescribing reporting and recordkeeping requirements in order to develop data relevant to maternal health. This data may prove extremely valuable as a means of enhancing physicians' medical judgment and enabling patients to approach the abortion decision with greater awareness of its consequences. Indeed, it would be absurd

108. *Id.* at 2844. The Court has apparently failed to distinguish between physical and emotional maturity. Justice Blackmun surely does not believe that pregnancy is proof of one's emotional maturity.

109. *Id.* at 2841-44.

110. *Id.* at 2844.

111. *See* Schulman v. New York City Health & Hosps. Corp., 38 N.Y.2d 234, 342 N.E.2d 501, 379 N.Y.S.2d 702 (1975); notes 38-46 and accompanying text *supra.*

112. *See* O'Meara, *Abortion: The Court Decides a Non-Case,* 1974 SUP. CT. REV. 337, 346-47; Comment, *The Case of Abortion,* 52 J. URB. L. 277, 335 (1974).

to deny states the opportunity to collect medical data concerning abortion, a medical procedure that involves serious dangers and permanent aftereffects, some of which are probably yet unknown. Abortion reporting provisions seem especially reasonable in view of the fact that state laws commonly require the reporting of certain communicable diseases to aid in protecting public health, even though such reporting tends to invade personal privacy.[113]

While the state's interest in maternal health lends vital support to the constitutionality of abortion reporting requirements, proper analysis requires equal consideration of the rights of women who elect to undergo an abortion. The typical objection to abortion recording and reporting regulations is that they tend collaterally to deter the exercise of the right to an abortion by exposing the abortion patient to the threat that her abortion may become public knowledge.[114] Despite the subjective nature of this argument, there can be little doubt that at least a few women would hesitate to procure an abortion, would use a false name, would seek an illegal abortion, or would even forego an abortion entirely because of their reluctance to risk public exposure. In the instant case, the Court obviously weighed this concern in the balance, as evidenced by the Court's emphasis on the protection of the patient's confidentiality and privacy.[115] Second-guessing the Supreme Court is a difficult and risky enterprise, but it appears that the confidentiality provision of the Missouri abortion law[116] was a crucial factor.[117]

A close examination of the fate of similar reporting provisions in other courts supports the thesis that confidentiality provisions are essential to the validity of reporting requirements. In every

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113. *E.g.*, CONN. GEN. STAT. ANN. § 19-89 (West 1969) (requiring physicians to report cases of cholera, yellow fever, typhus fever, leprosy, smallpox, diphtheria, typhoid fever, scarlet fever, syphilis, gonorrhea, chancroid, and other communicable diseases).

114. *See* Schulman v. New York City Health & Hosps. Corp., 38 N.Y.2d 234, 240, 255-56, 342 N.E.2d 501, 504, 513-14, 379 N.Y.S.2d 702, 706, 718-19 (1975); Note, *Implications of the Abortion Decisions: Post* Roe *and* Doe *Litigation and Legislation*, 74 COLUM. L. REV. 237, 247-48, 251 (1974).

115. 96 S. Ct. at 2846.

116. MO. ANN. STAT. § 188.055(3) (Vernon Supp. 1976) provides in pertinent part:

> All information obtained by physician, hospital, clinic or other health facility from a patient for the purpose of preparing reports to the division of health under this section or reports received by the division of health shall be confidential and shall be used only for statistical purposes. Such records, however, may be inspected and health data acquired by local, state, or national public health officers.

The statute also provides that breach of confidentiality is a misdemeanor. *Id.* § 188.070.

117. *See* 96 S. Ct. at 2846.

instance in which reporting requirements were upheld, the challenged regulations included a provision protecting the confidentiality of abortion patients.[118] Of decisions that invalidated reporting requirements, about half involved regulations that failed to provide for confidentiality;[119] the other half were typically decisions that held abortion statutes or ordinances unconstitutional as a whole, without individual consideration of reporting requirements.[120]

A difficult question of degree might arise if an abortion patient should insist that a particular confidentiality provision fails to adequately protect confidentiality, either because the provision does not sufficiently restrict access to the patient's records or because the provision is frequently ignored in practice.[121] The balancing approach, however, has sufficient flexibility to accommodate this objection and allow it to be properly weighed in light of the facts of the particular case.

Unlike the regulations in the instant case, some abortion reporting laws do not require the patient's name and address to be recorded.[122] Such regulatory schemes clearly avoid the problem of confidentiality, but it appears that the constitutional "right

118. Doe v. Bolton, 410 U.S. 179 (1973) (implicitly sustaining a Georgia regulation requiring reporting of abortions and providing for confidentiality); Planned Parenthood Ass'n v. Fitzpatrick, 401 F. Supp. 554 (E.D. Pa. 1975) (upholding a portion of a provision that required reporting of patient's name, address, age, and date of abortion and that protected confidentiality); Wolfe v. Schroering, 388 F. Supp. 631 (W.D. Ky. 1974), *rev'd on other grounds*, 541 F.2d 523 (6th Cir. 1976) (upholding a reporting statute that did not require reporting of names and ordering that patient's street address not be reported); Schulman v. New York City Health & Hosps. Corp., 38 N.Y.2d 234, 342 N.E.2d 501, 379 N.Y.S.2d 702 (1975) (sustaining regulations requiring reporting of patient's name and address and providing for confidentiality).

119. Word v. Poelker, 495 F.2d 1349 (8th Cir. 1974) (invalidating entire abortion ordinance that included name reporting requirement but did not provide for confidentiality); Doe v. Rampton, 366 F. Supp. 189 (D. Utah 1973) (striking down entire statute containing provision requiring extensive reporting without protecting confidentiality, but two of the three judges felt that the reporting provision was constitutional).

120. Friendship Medical Center, Ltd. v. Chicago Bd. of Health, 505 F.2d 1141 (7th Cir. 1974), *cert. denied*, 420 U.S. 997 (1975); Doe v. Zimmerman, 405 F. Supp. 534 (M.D. Pa. 1975) (slight individual consideration of reporting requirements); Hodgson v. Anderson, 378 F. Supp. 1008 (D. Minn. 1974), *appeal dismissed for want of juris. sub nom.* Spannaus v. Hodgson, 420 U.S. 903 (1975), *rev'd per curiam sub nom.* Hodgson v. Lawson, No. 74-1569 (8th Cir., Oct. 6, 1976).

121. For discussion of practical difficulties in maintaining confidentiality of medical records, see Boyer, *Computerized Medical Records and the Right to Privacy: The Emerging Federal Response*, 25 BUFFALO L. REV. 37 (1975); Comment, *Information Privacy: Constitutional Challenges to the Collection and Dissemination of Personal Information by Government Agencies*, 3 HASTINGS CONST. L.Q. 229 (1976).

122. *E.g.*, KY. REV. STAT. § 213.055 (Supp. 1976), *construed in* Wolfe v. Schroering, 388 F. Supp. 631 (W.D. Ky. 1974); S.D. COMPILED LAWS ANN. § 34-23A-19 (Supp. 1976).

of privacy" does not require the state entirely to forego gathering any abortion information that might identify the patient. In *Schulman,* the court rejected the argument that reporting the patient's name and address violated the right of privacy.[123] The dissenting justices, however, were convinced that the state's interest in gathering statistical data relevant to maternal health could be adequately recognized without reporting names and addresses.[124]

In the instant case, the Court did not explicitly deal with the state's interest in obtaining names and addresses of abortion patients, but it implicitly recognized such an interest in holding that reporting of abortions is permissible if the patient's confidentiality and privacy are protected.[125] Without the patient's name, the state would, as a practical matter, be unable to develop statistical information concerning the medical consequences of repeated abortions performed on the same woman.[126] Since existing data suggest that repeated abortions threaten to impair the patient's health,[127] the state should have the opportunity to facilitate collection of further information as to the effects of repeated abortions by requiring reporting of patients' names and addresses (in addition to medical information), as long as confidentiality is preserved.

In summary, a reasonableness standard that includes a neutral weighing of interests[128] was probably the test employed by the Court to reach the sound conclusion that "[r]ecord-keeping and reporting requirements that are reasonably directed to the preservation of maternal health and that properly respect a patient's confidentiality and privacy are permissible."[129] The Court apparently found Missouri's abortion reporting provisions reasonable and valid because the state's interest in gathering data relevant to maternal health outweighs the patient's interest in keeping information about her abortion completely off the record.

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123. 38 N.Y.2d at 240, 242-44, 342 N.E.2d at 504, 506-07, 379 N.Y.S.2d at 706, 708-09.

124. *Id.* at 245-57, 342 N.E.2d at 508-15, 379 N.Y.S.2d at 710-21.

125. 96 S. Ct. at 2846.

126. *See* notes 44-46 and accompanying text *supra.*

127. O'Meara, *supra* note 112, at 346-47.

128. "Neutral" is used here to suggest a weighing of interests without the distorting influence of either the compelling state interest test, which overemphasizes the rights of the individual, or the minimum rationality approach, which affords individual rights almost no protection.

129. 96 S. Ct. at 2846.

D. Reporting Allowed at All Stages of Pregnancy

Perhaps the most unexpected aspect of the Court's holding with respect to abortion reporting requirements is the Court's approval of a statute requiring reporting at all stages of pregnancy,[130] despite strong language in *Roe v. Wade* proscribing *any* regulation of first trimester abortions.[131] A possible explanation for this result is that the impact on the patient of reporting is so insignificant (when confidentiality is protected) that reporting requirements cannot be said to limit or regulate abortion at all.[132] However, such an explanation lacks cogency in light of the Court's concern for balancing interests and finding a reasonable relation to maternal health.[133] If there were no possibility that reporting might significantly infringe the right to abortion, the Court would have had no occasion to justify reporting by invoking the state's interest in maternal health.

Another possible, and more plausible, explanation for the Court's approval of first trimester reporting is that the Supreme Court, beleaguered by well-reasoned attacks on its ban of first trimester regulation,[134] may be laying the foundation for a circumspect retreat from the stance of *Roe v. Wade*. This view is supported by the Court's holding that a provision requiring the patient's written consent to her own abortion in the first twelve weeks of pregnancy is not unconstitutional.[135] Regulation during the first stage of pregnancy, strangely, is consistent with the holding of *Doe v. Bolton* (the companion case to *Roe*), which involved the challenge of a Georgia statute containing reporting provisions

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130. *Id.*

131. In *Roe* the Court held that, in the first trimester of pregnancy,

> the attending physician, in consultation with his patient, is free to determine, *without regulation* by the State, that, in his medical judgment, the patient's pregnancy should be terminated. If that decision is reached, the judgment may be effectuated by an abortion *free of interference* by the State.

410 U.S. at 163 (emphasis added).

132. In Bates v. City of Little Rock, 361 U.S. 516 (1960), the Court said:

> Where there is a *significant* encroachment upon personal liberty, the State may prevail only upon showing a subordinating interest which is compelling. . . .
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> . . . .
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> . . . When it is shown that state action threatens *significantly* to impinge upon constitutionally protected freedom it becomes the duty of this Court to determine whether the action bears a reasonable relationship to the achievement of the governmental purpose asserted as its justification.

Id. at 524-25 (emphasis added).

133. 96 S. Ct. at 2846.

134. *E.g.*, Ely, *supra* note 4, at 942 n.117; Epstein, *supra* note 4, at 181-83.

135. 96 S. Ct. at 2839-40.

similar to Missouri's.[136] Under Georgia's law, reporting was also required during the first stage of pregnancy,[137] yet the Court in *Doe* did not invalidate the reporting provision.[138] Since it seems unlikely that this discrepancy between *Roe* and *Doe* was due to oversight, it is possible that the Court felt that reporting was merely a procedural regulation governed by less stringent standards than those applicable to substantive regulation of abortions,[139] or the Court may have overstated its point in *Roe v. Wade*.[140]

A more satisfactory justification for the seemingly contradictory judicial endorsement of reporting requirements for abortions performed in the first stage of pregnancy rests in part upon *Roe v. Wade*'s holding that for the first stage of pregnancy, "the abortion decision and its effectuation must be left to the medical judgment of the pregnant woman's attending physician."[141] In the instant case, the Court observed that recordkeeping data "may be a resorce that is relevant to decisions involving medical experience and judgment."[142] These two statements in juxtaposition, coupled with an awareness of the dangers and serious medical consequences of abortions,[143] offer a sound basis for permitting the state to collect data concerning abortions in order to enhance the attending physician's medical judgment, as well as to enable the pregnant woman to cope more intelligently with the abortion de-

136. 410 U.S. at 181-84.

137. *See* GA. CODE ANN. § 26-1202(b)(7)-(9) (1972). The statute makes no exception for first trimester abortions. This statute was replaced in 1973 by one containing similar reporting provisions. *Id.* § 26-1202(d) (Supp. 1976).

138. 410 U.S. at 184, 201.

139. In Roe v. Wade, 410 U.S. 113, 165 (1973), the Court made reference to its consideration of "procedural requirements" in *Doe*. One might infer that the Court regarded *Roe* as dealing with laws that prohibit abortion (substantive regulation), while it regarded *Doe* as dealing with laws that impose certain conditions on the performing of abortions (procedural regulation). *See* Note, *The Abortion Cases: A Return to Lochner, or a New Substantive Due Process?*, 37 ALB. L. REV. 776, 794-95 (1973). In the instant case, however, the Court said that, after the first stage of pregnancy, the state could adopt "substantive as well as recordkeeping regulations that are reasonable means of protecting maternal health." 96 S. Ct. at 2846. This statement clearly does not fit such a substance-versus-procedure dichotomy because it does not use the word "substantive" to denote a prohibition of abortion. Any kind of a substance-procedure dichotomy in abortion regulation would probably be extremely difficult to maintain with any integrity because the distinction is based more on semantics than rational analysis. Therefore, the distinction does not appear to be a sound basis for applying different constitutional standards to abortion regulations.

140. *See* note 131 and accompanying text *supra*.

141. 410 U.S. at 164.

142. 96 S. Ct. at 2846.

143. See text accompanying notes 112-113 *supra*.

cision. With regard to first trimester regulation of abortion, the enormous advantage of a balancing technique over a mechanical jurisprudence is evident: the Court can weigh the relevant factors in the balance and reasonably and justifiably conclude that reporting of first trimester abortions ought to be permitted.